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HOUSE BILL 2246

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State of Washington

59th Legislature

2005 Regular Session

By Representatives Conway and Wood; by request of Employment Security Department

Read first time 02/28/2005. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to ensuring employers pay the contribution rate  
2 they have earned; amending RCW 50.04.245, 50.04.320, 50.24.170,  
3 50.29.062, and 50.12.220; adding new sections to chapter 50.04 RCW;  
4 adding a new section to chapter 50.36 RCW; adding a new section to  
5 chapter 50.29 RCW; creating a new section; recodifying RCW 50.12.220;  
6 and prescribing penalties.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 **Sec. 1.** RCW 50.04.245 and 1995 c 120 s 1 are each amended to read  
9 as follows:

10 (1) Subject to the other provisions of this title, personal  
11 services performed for, or for the benefit of, a third party pursuant  
12 to a contract with a temporary services agency, (~~employee leasing~~  
13 ~~agency,~~) services referral agency, or other entity shall be deemed to  
14 be employment for the temporary services agency, employee leasing  
15 agency, services referral agency, or other entity when the agency is  
16 responsible, under contract or in fact, for the payment of wages in  
17 remuneration for the services performed.

18 The temporary services agency, staffing company, services referral

1 agency, or other such entity will be considered the employer as defined  
2 in RCW 50.04.080 and the employing unit as defined in RCW 50.04.090.

3 (2) For the purposes of this section:

4 (a) "Temporary services agency" or "staffing company" means an  
5 individual or entity (~~(that is engaged in the business of furnishing~~  
6 ~~individuals to perform services on a part time or temporary basis for~~  
7 ~~a third party.~~

8 ~~(b) "Employee leasing agency" means an individual or entity that~~  
9 ~~for a fee places the employees of a client onto its payroll and leases~~  
10 ~~such employees back to the client)) other than a professional employer~~  
11 organization, that hires its own employees and assigns them to a client  
12 to support or supplement the client's work force on a temporary basis  
13 for special work situations such as employee absences, temporary skill  
14 shortages, seasonal workloads, and special assignments and projects.

15 ~~((+e))~~ (b) "Services referral agency" means an individual or  
16 entity that is engaged in the business of offering the services of an  
17 individual to perform specific tasks for a third party.

18 NEW SECTION. Sec. 2. A new section is added to chapter 50.04 RCW  
19 to read as follows:

20 (1) Subject to the other provisions of this title, personal  
21 services performed for, or for the benefit of, a client employer  
22 pursuant to a written contract with an employee leasing agency,  
23 professional employer organization, or other similar entity shall be  
24 deemed to be employment for the client employer for unemployment  
25 insurance reporting purposes.

26 The client employer will be considered the employer as defined in  
27 RCW 50.04.080 and the employing unit as defined in RCW 50.04.090.

28 (2) For the purposes of this chapter:

29 (a) "Employee leasing agency" means an individual or entity that  
30 for a fee places the employees of a client onto its payroll and leases  
31 such employees back to the client.

32 (b) "Professional employer organization" means an individual or  
33 entity that provides employment administrative services, benefit  
34 options and administration, and employer liability management and  
35 services to a client employer.

36 (c) "Client employer" means an individual or entity that enters

1 into a professional services agreement with an employee leasing agency  
2 or professional employer organization.

3 (d) "Professional employer services" means services provided by a  
4 professional employer organization for a client pursuant to an  
5 agreement that establishes a coemployment relationship for the  
6 provision of payroll, benefits, and other human resource functions, or  
7 the leasing of employees.

8 NEW SECTION. **Sec. 3.** A new section is added to chapter 50.04 RCW  
9 to read as follows:

10 (1) A common pay agent or common paymaster will not be considered  
11 the employer as defined in RCW 50.04.080 or the employing unit as  
12 defined in RCW 50.04.090.

13 (2) For the purposes of this chapter:

14 (a) A common pay agent is an independent third party who contracts  
15 with, and represents, two or more employers; and who files a combined  
16 tax report for those employers.

17 (b) A common paymaster is two or more employers in which one of the  
18 employers has been designated to disburse wages to concurrently  
19 employed individuals of any of the related companies.

20 **Sec. 4.** RCW 50.04.320 and 1998 c 162 s 1 are each amended to read  
21 as follows:

22 (1) For the purpose of payment of contributions, "wages" means the  
23 remuneration paid by one employer during any calendar year to an  
24 individual in its employment under this title or the unemployment  
25 compensation law of any other state in the amount specified in RCW  
26 50.24.010. If an employer (hereinafter referred to as a successor  
27 employer) during any calendar year acquires substantially all or a  
28 portion of the operating assets, and/or the employees of another  
29 employer (hereinafter referred to as a predecessor employer) or  
30 operating assets, and/or the employees, used in a separate unit of a  
31 trade or business of a predecessor employer, and immediately after the  
32 acquisition employs in the individual's trade or business an individual  
33 who immediately before the acquisition was employed in the trade or  
34 business of the predecessor employer, then, for the purposes of  
35 determining the amount of remuneration paid by the successor employer  
36 to the individual during the calendar year which is subject to

1 contributions, any remuneration paid to the individual by the  
2 predecessor employer during that calendar year and before the  
3 acquisition shall be considered as having been paid by the successor  
4 employer.

5 (2) For the purpose of payment of benefits, "wages" means the  
6 remuneration paid by one or more employers to an individual for  
7 employment under this title during his base year: PROVIDED, That at  
8 the request of a claimant, wages may be calculated on the basis of  
9 remuneration payable. The department shall notify each claimant that  
10 wages are calculated on the basis of remuneration paid, but at the  
11 claimant's request a redetermination may be performed and based on  
12 remuneration payable.

13 (3) For the purpose of payment of benefits and payment of  
14 contributions, the term "wages" includes tips (~~(which are)~~) received  
15 (~~(after January 1, 1987,)~~) while performing services which constitute  
16 employment, and which are reported to the employer for federal income  
17 tax purposes.

18 (4)(a) "Remuneration" means all compensation paid for personal  
19 services including commissions and bonuses and the cash value of all  
20 compensation paid in any medium other than cash. The reasonable cash  
21 value of compensation paid in any medium other than cash and the  
22 reasonable value of gratuities shall be estimated and determined in  
23 accordance with rules prescribed by the commissioner. Remuneration  
24 does not include payments to members of a reserve component of the  
25 armed forces of the United States, including the organized militia of  
26 the state of Washington, for the performance of duty for periods not  
27 exceeding seventy-two hours at a time.

28 (b) Previously accrued compensation, other than severance pay or  
29 payments received pursuant to plant closure agreements, when assigned  
30 to a specific period of time by virtue of a collective bargaining  
31 agreement, individual employment contract, customary trade practice, or  
32 request of the individual compensated, shall be considered remuneration  
33 for the period to which it is assigned. Assignment clearly occurs when  
34 the compensation serves to make the individual eligible for all regular  
35 fringe benefits for the period to which the compensation is assigned.

36 (c) Settlements or other proceeds received by an individual as a  
37 result of a negotiated settlement for termination of an individual  
38 written employment contract prior to its expiration date shall be

1 considered remuneration. The proceeds shall be deemed assigned in the  
2 same intervals and in the same amount for each interval as compensation  
3 was allocated under the contract.

4 (d) Except as provided in (c) of this subsection, the provisions of  
5 this subsection (4) pertaining to the assignment of previously accrued  
6 compensation shall not apply to individuals subject to RCW 50.44.050.

7 **Sec. 5.** RCW 50.24.170 and 1945 c 35 s 105 are each amended to read  
8 as follows:

9 (1) The commissioner shall prescribe regulations for the  
10 establishment, maintenance, and dissolution of joint accounts by two or  
11 more employers, and shall, in accordance with such regulations and upon  
12 application by two or more employers to establish such account, or to  
13 merge their several individual accounts in a joint account, maintain  
14 such joint account as if it constituted a single employer's account.

15 (2) Joint accounts may not be established for individuals or  
16 entities defined under section 2 or 3 of this act.

17 **Sec. 6.** RCW 50.29.062 and 2003 2nd sp.s. c 4 s 18 are each amended  
18 to read as follows:

19 Predecessor and successor employer contribution rates shall be  
20 computed in the following manner:

21 (1) If the successor is an employer, as defined in RCW 50.04.080,  
22 at the time of the transfer(~~(τ)~~):

23 (a) Its contribution rate shall remain unchanged for the remainder  
24 of the rate year in which the transfer occurs.

25 ~~((From and after))~~ (b) Beginning January 1st following the  
26 transfer, the successor's contribution rate for each rate year shall be  
27 based on ((its)) a combination of the following:

28 (i) The successor's experience with payrolls and benefits  
29 ~~((including the experience of the acquired business or portion of a~~  
30 ~~business from the date of transfer, as of the regular computation date~~  
31 ~~for that rate year)); and~~

32 (ii) Any experience assigned to the predecessor involved in the  
33 transfer. If only a portion of the business was transferred, then the  
34 experience attributable to the acquired portion is assigned to the  
35 successor.

1 (c) If it is found that a substantial purpose of the transfer of  
2 the business was to obtain a reduced array calculation factor rate,  
3 then the experience rating accounts of the employers involved shall be  
4 combined into a single account and assigned the higher of the  
5 predecessor or successor array calculation factor rate effective as of  
6 the date of the transfer.

7 ~~((For transfers before January 1, 2005, the following applies))~~  
8 If the successor is not an employer at the time of the transfer((-)),  
9 the following applies:

10 (a) For transfers before January 1, 2005, except as provided in  
11 (iii) of this subsection the successor shall pay contributions at the  
12 lowest rate determined under either of the following:

13 ~~((a)) (i) ((For transfers before January 1, 1997, the contribution~~  
14 ~~rate of the rate class assigned to the predecessor employer at the time~~  
15 ~~of the transfer for the remainder of that rate year and continuing~~  
16 ~~until the successor qualifies for a different rate in its own right;~~

17 ~~(ii) For transfers on or after January 1, 1997,))~~ The contribution  
18 rate of the rate class assigned to the predecessor employer at the time  
19 of the transfer for the remainder of that rate year. Any experience  
20 relating to the assignment of that rate class attributable to the  
21 predecessor is transferred to the successor. Beginning with the  
22 January 1<sup>st</sup> following the transfer, the successor's contribution rate  
23 shall be based on a combination of the transferred experience of the  
24 acquired business and the successor's experience after the transfer; or

25 ~~((b))~~ (ii) The contribution rate equal to the average industry  
26 rate as determined by the commissioner, but not less than one percent,  
27 and continuing until the successor qualifies for a different rate in  
28 its own right. Assignment of employers by the commissioner to  
29 industrial classification, for purposes of this subsection, must be in  
30 accordance with established classification practices found in the  
31 (("Standard Industrial Classification Manual")) North American industry  
32 classification system issued by the federal office of management and  
33 budget to the ((third)) fourth digit provided in the ((standard  
34 industrial classification code, or in the)) North American industry  
35 classification code system.

36 ~~((3) For transfers before January 1, 2005, if the successor is not~~  
37 ~~an employer at the time of the transfer and)) (iii) If the successor  
38 simultaneously acquires the business or a portion of the business of~~

1 two or more employers in different rate classes, its rate from the date  
2 the transfer occurred until the end of that rate year and until it  
3 qualifies in its own right for a new rate, shall be the highest rate  
4 class applicable at the time of the acquisition to any predecessor  
5 employer who is a party to the acquisition, but not less than one  
6 percent.

7 ~~((4))~~ (b) For transfers on or after January 1, 2005, ~~((the~~  
8 ~~following applies if the successor is not an employer at the time of~~  
9 ~~the transfer:~~

10 ~~(a))~~ except as provided in ~~((b))~~ (iii) of this subsection, the  
11 successor shall pay contributions:

12 (i) At the contribution rate ~~((determined for))~~ assigned to the  
13 predecessor employer at the time of the transfer for the remainder of  
14 ~~((the))~~ that rate year. Any experience attributable to the predecessor  
15 relating to the assignment of the predecessor's rate class is  
16 transferred to the successor. ~~((On and after))~~ Beginning January 1st  
17 following the transfer, the successor's array calculation factor rate  
18 shall be based on a combination of the transferred experience of the  
19 acquired business and the successor's experience after the transfer if  
20 qualified under RCW 50.29.010(6) by including the transferred  
21 experience; or

22 (ii) At the contribution rate equal to the sum of the rates  
23 determined by the commissioner under RCW 50.29.025(2) (c)(ii) and  
24 (d)(ii), and 50.29.041, if applicable, and continuing until the  
25 successor qualifies for a different rate in its own right.

26 ~~((b))~~ (iii) If there is a substantial continuity of ownership,  
27 control, or management by the successor of the business of the  
28 predecessor, the successor shall pay contributions at the contribution  
29 rate determined for the predecessor employer at the time of the  
30 transfer for the remainder of that rate year. Any experience  
31 attributable to the predecessor relating to the assignment of the  
32 predecessor's rate class is transferred to the successor. ~~((On and~~  
33 ~~after))~~ Beginning January 1st following the transfer, the successor's  
34 array calculation factor rate shall be based on a combination of the  
35 transferred experience of the acquired business and the successor's  
36 experience after the transfer.

37 ~~((e))~~ (iv) If the successor simultaneously acquires the business  
38 or a portion of the business of two or more employers with different

1 contribution rates, the successor's rate from the date the transfer  
2 occurred until the end of that rate year and until it qualifies in its  
3 own right for a new rate, shall be the sum of the rates determined by  
4 the commissioner under RCW 50.29.025(2) (a) and (b), and 50.29.041,  
5 applicable at the time of the acquisition, to the predecessor employer  
6 who, among the parties to the acquisition, had the largest (~~taxable~~)  
7 total payroll in the completed calendar quarter immediately preceding  
8 the date of transfer, but not less than the sum of the rates determined  
9 by the commissioner under RCW 50.29.025(2) (c)(ii) and (d)(ii), and  
10 50.29.041, if applicable.

11 ~~((+5))~~ (c) The experience attributable to the predecessor employer  
12 shall not be transferred if the successor employer is found to have  
13 acquired the business solely or primarily for the purpose of obtaining  
14 a lower array calculation factor rate. Instead, the new employer rate  
15 will be assigned.

16 (3) The contribution rate on any payroll retained by a predecessor  
17 employer shall remain unchanged for the remainder of the rate year in  
18 which the transfer occurs.

19 ~~((+6))~~ (4) In all cases, ~~((from and after))~~ beginning January 1<sup>st</sup>  
20 following the transfer, the predecessor's contribution rate or~~((~~  
21 ~~beginning January 1, 2005,~~) the predecessor's array calculation factor  
22 for each rate year shall be based on its experience with payrolls and  
23 benefits as of the regular computation date for that rate year  
24 ~~((including))~~ excluding the experience of the ~~((acquired))~~ transferred  
25 business or transferred portion of business ~~((up to the date of~~  
26 ~~transfer))~~ as that experience has transferred to the successor:  
27 PROVIDED, That if all of the predecessor's business is transferred to  
28 a successor or successors, the predecessor shall not be a qualified  
29 employer until it satisfies the requirements of a "qualified employer"  
30 as set forth in RCW 50.29.010.

31 **Sec. 7.** RCW 50.12.220 and 2004 c 97 s 1 are each amended to read  
32 as follows:

33 (1)~~((+a))~~ If an employer fails to file ~~((in))~~ a timely ~~((and~~  
34 ~~complete manner a))~~ report as required by RCW 50.12.070, or the rules  
35 adopted pursuant thereto, ~~((the employer shall be subject to a penalty~~  
36 ~~to be determined by the commissioner, but not to exceed two hundred~~

1 ~~fifty dollars or ten percent of the quarterly contributions for each~~  
2 ~~such offense, whichever is less.~~

3 (b)) the employer is subject to a penalty of twenty-five dollars  
4 per violation, unless the penalty is waived by the department.

5 (b) An employer who files an incomplete or incorrectly formatted  
6 tax and wage report as required by RCW 50.12.070 shall receive a  
7 warning letter for the first occurrence. For subsequent occurrences,  
8 the employer is subject to a penalty as follows:

9 (i) When no contributions are due, the second occurrence is subject  
10 to a seventy-five dollar penalty, the third occurrence is subject to a  
11 one hundred fifty dollar penalty, and for the fourth occurrence and  
12 thereafter, a penalty of two hundred fifty dollars will be assessed.

13 (ii) When contributions are due, the second occurrence is subject  
14 to a penalty of ten percent of the quarterly contributions due, but not  
15 less than seventy-five dollars, the third occurrence is subject to a  
16 penalty of ten percent of the quarterly contributions due, but not less  
17 than one hundred fifty dollars, and for the fourth occurrence and  
18 thereafter, a penalty of two hundred fifty dollars will be assessed.

19 (2) If an employer knowingly misrepresents to the employment  
20 security department the amount of his or her payroll upon which  
21 contributions under this title are based, the employer shall be liable  
22 to the state for up to ten times the amount of the difference in  
23 contributions paid, if any, and the amount the employer should have  
24 paid and for the reasonable expenses of auditing his or her books and  
25 collecting such sums. Such liability may be enforced in the name of  
26 the department.

27 ((+e)) (3) If any part of a delinquency for which an assessment is  
28 made under this title is due to an intent to evade the successorship  
29 provisions of RCW 50.29.062, then for the calendar year in which the  
30 commissioner makes the determination under this subsection, the  
31 commissioner shall assign to the employer, and to any business found to  
32 be promoting the evasion of such provisions, the contribution rate  
33 determined for that calendar year under RCW 50.29.025, including the  
34 solvency surcharge, if any, for rate class 20 or rate class 40, as  
35 applicable, plus two percent. Such employer must also pay for the  
36 reasonable expenses of auditing his or her books and collecting such  
37 sums.

1        (a) If the person evading successorship provisions, or promoting  
2 evasion of such provisions, is not an employer, such person shall be  
3 subject to the penalties prescribed in RCW 50.36.020 as if they were an  
4 employer, plus the reasonable expenses of auditing his or her books and  
5 collecting such sums.

6        (b) For purposes of this section, the term "knowingly" means having  
7 actual knowledge of or acting with deliberate ignorance or reckless  
8 disregard for the prohibition involved and, includes, but is not  
9 limited to, intent to evade, misrepresentation, or willful  
10 nondisclosure.

11        (c) The commissioner shall establish procedures to enforce this  
12 subsection.

13        ~~((2))~~ (4) If contributions are not paid on the date on which they  
14 are due and payable as prescribed by the commissioner, there shall be  
15 assessed a penalty of five percent of the amount of the contributions  
16 for the first month or part thereof of delinquency; there shall be  
17 assessed a total penalty of ten percent of the amount of the  
18 contributions for the second month or part thereof of delinquency; and  
19 there shall be assessed a total penalty of twenty percent of the amount  
20 of the contributions for the third month or part thereof of  
21 delinquency. No penalty so added shall be less than ten dollars.  
22 These penalties are in addition to the interest charges assessed under  
23 RCW 50.24.040.

24        ~~((3))~~ (5) Penalties shall not accrue on contributions from an  
25 estate in the hands of a receiver, executor, administrator, trustee in  
26 bankruptcy, common law assignee, or other liquidating officer  
27 subsequent to the date when such receiver, executor, administrator,  
28 trustee in bankruptcy, common law assignee, or other liquidating  
29 officer qualifies as such, but contributions accruing with respect to  
30 employment of persons by a receiver, executor, administrator, trustee  
31 in bankruptcy, common law assignee, or other liquidating officer shall  
32 become due and shall be subject to penalties in the same manner as  
33 contributions due from other employers.

34        ~~((4))~~ (6) Where adequate information has been furnished to the  
35 department and the department has failed to act or has advised the  
36 employer of no liability or inability to decide the issue, penalties  
37 shall be waived by the commissioner. Penalties may also be waived for

1 good cause if the commissioner determines that the failure to  
2 (~~timely~~) file timely and complete reports or pay contributions was  
3 not due to the employer's fault.

4 (~~(+5)~~) (7) Any decision to assess a penalty as provided by this  
5 section shall be made by the chief administrative officer of the tax  
6 branch or his or her designee.

7 (~~(+6)~~) (8) Nothing in this section shall be construed to deny an  
8 employer the right to appeal the assessment of any penalty. Such  
9 appeal shall be made in the manner provided in RCW 50.32.030.

10 NEW SECTION. Sec. 8. RCW 50.12.220 is recodified as a new section  
11 in chapter 50.36 RCW.

12 NEW SECTION. Sec. 9. A new section is added to chapter 50.29 RCW  
13 to read as follows:

14 The commissioner of the employment security department may adopt  
15 such rules as are necessary to implement this act.

16 NEW SECTION. Sec. 10. If any part of this act is found to be in  
17 conflict with federal requirements that are a prescribed condition to  
18 the allocation of federal funds to the state or the eligibility of  
19 employers in this state for federal unemployment tax credits, the  
20 conflicting part of this act is inoperative solely to the extent of the  
21 conflict, and the finding or determination does not affect the  
22 operation of the remainder of this act. Rules adopted under this act  
23 must meet federal requirements that are a necessary condition to the  
24 receipt of federal funds by the state or the granting of federal  
25 unemployment tax credits to employers in this state.

26 NEW SECTION. Sec. 11. If any provision of this act or its  
27 application to any person or circumstance is held invalid, the  
28 remainder of the act or the application of the provision to other  
29 persons or circumstances is not affected.

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